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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. 1125

SAMUEL EMANUEL, INDIVIDUALLY AND AS TESTAMENTARY EXECUTOR AND RESIDUARY LEGATEE OF THE SUCCESSION OF IRMA TURNER WILSON AND MARY STEWART EMANUEL,

Appellants,

versus

HAROLD CHAPPLE, TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JOE WILSON,

Appellee.

On Appeal from the Supreme Court of Louisiana

MOTION TO DISMISS APPEAL

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Appellants,

versus

HAROLD CHAPPLE, TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JOE WILSON,

Appellee.

On Appeal from the Supreme Court of Louisiana

MOTION TO DISMISS APPEAL

Appellee in the above-entitled case moves to dismiss the appeal on the following grounds:

1. No Federal question was raised or passed on in any State Court.

2. The appeal does not present a substantial Federal question.

3. The judgment rests on an adequate non-federal basis.

STATEMENT

Irma Turner Wilson died on July 21, 1966 (R. 13). On September 14, 1966, Joe Wilson, her surviving husband, filed a petition requesting notice of an application for appointment as administrator or other legal representative of the Succession of Irma Turner Wilson (R. 7). Irma Turner Wilson left a purported will (R. 8-9) purporting to be made in the form authorized by Louisiana Revised Statutes, Title 9, Sec. 2442. That section of Louisiana Revised Statutes, as amended by Act 66 of the Legislature of Louisiana of 1952, which is the statute as it existed on July 7, 1960, the date of the purported will, is quoted in Appendix "A", infra. It was later amended by Act 123 of the Legislature of Louisiana of 1964 to add a requirement (not material to this case) in the making of a will in the form authorized by the statute. On October 27, 1966, the Fourth Judicial District Court, Ouachita Parish, Louisiana, (the trial Court) admitted to probate the purported will of Irma Turner Wilson in ex parte proceedings (R. 14-15). As authorized by Article 3081

of the Louisiana Code of Civil Procedure (Appendix "B", infra), Samuel Emanuel could have asked for appointment as testamentary executor without notice to anyone at the time the will was admitted to probate, but he did not move or pray for such appointment at that time. On November 15, 1966, Joe Wilson, surviving husband of decedent, Irma Turner Wilson, as authorized by Article 2931 of the Louisiana Code of Civil Procedure (Appendix "C", infra), filed a petition being a direct action against all the legatees and executor named in the purported will of Irma Turner Wilson, praying that the trial Court decree the purported will a nullity and rescind the order of probate (R. 16-24). On December 5, 1966, in order to show his right to inherit the estate of his deceased wife in the event the will should be declared a nullity, Joe Wilson amended his petition to more clearly show that decedent, Irma Turner Wilson, left no relative having a prior right of inheritance (R. 26). On September 20, 1967, Samuel Emanuel filed an application for appointment as testamentary executor of the Succession of Irma Turner Wilson (R. 59-63). Instead of proceeding ex parte, he prayed for and obtained an order of the trial Court assigning September 28, 1967, as the date for the hearing on the application, and served notice of the application on opposing counsel (R. 63). The death of Joe Wilson having occured on September 20, 1967, and Harold Chapple having qualified as testamentary executor of the Succession of Joe Wilson, Harold Chapple was substituted

as party plaintiff in the suit originally filed by Joe Wilson praying for the nullity of the will of Irma Turner Wilson. This was accomplished by ex parte petition and order of the trial Court on September 26, 1967 (R. 64-66), as authorized by Article 801 of the Louisiana Code of Civil Procedure (Appendix "D", infra). On September 27, 1967, Harold Chapple, the substituted party plaintiff in the suit for annulment of the will, filed an opposition to the appointment of Samuel Emanuel as testamentary executor (R. 73-78). Opponent alleged as his reason for opposition that the purported will of Irma Turner Wilson is an absolute nullity, and the nullity appears from the face of the purported will, and the purported will is not made in any form authorized by the law of Louisiana for the making of wills (R. 76). This was a collateral attack on the purported will pending the direct action for the nullity of the purported will, and after hearing evidence on the opposition to the appointment of Samuel Emanuel as testamentary executor (R. 161), the trial Court allowed the filing of briefs and on October 13, 1967, filed written reasons for judgment overruling the opposition to the appointment of Samuel Emanuel as testamentary executor (R. 150), for the reason that this was a collateral attack on the will of Irma Turner Wilson. On October 13, 1967, the Court signed a judgment confirming Samuel Emanuel as testamentary executor without bond and ordering that letters as such issue to him upon his taking the oath as prescribed by law (R. 154):

A written transcript of the evidence on the trial of the case on the merits, November 22, 1967, appears in the record as pages 235-331. On January 10, 1968, the trial Court rendered judgment for plaintiff, decreeing the purported will of Irma Turner Wilson to be null, and rescinding the order of probate of the purported will (R. 151-153). The judgment signed by the trial Court on January 10, 1968, is in the record at page 156. On motion for new trial filed by plaintiff (R. 123-125), the trial Court granted a new trial, and on new trial amended the former judgment to decree that defendants pay all costs of court (R. 157). On appeal to the Court of Appeal of Louisiana, Second Circuit, that Court affirmed the judgment of the trial Court (213 So. 2d 776). The opinion of the Court of Appeal is quoted as Appendix "B" of jurisdictional statement filed by appellants. The Supreme Court of Louisiana denied the application of appellants for certiorari or writ of review, 216 So. 2d 305. The opinion of the Supreme Court of Louisiana is quoted as Appendix "C" of appellants' jurisdictional statement. Appellants did not at any time in any of the three State Courts plead or argue or in any other manner raise any question arising under the Federal Constitution or statutes. None of the opinions of the three State Courts mentions, discusses or otherwise passes upon any question arising under the federal Constitution or statutes. In the State Courts, appellants did not challenge the validity of any State statute at any time. The sole basis for the decisions of the State

Courts was a construction of State laws and application of State laws to the facts of this case.

QUESTIONS PRESENTED

1. Where appellants have not raised in the State Court any question concerning the validity of any State statutes on the ground of their repugnancy to the Constitution, treaties or laws of the United States, and the opinions, judgments and orders of the State Courts do not mention, discuss or pass on any Federal question, does the jurisdiction of the Supreme Court of the United States attach on appeal from a judgment of a State Court declaring null and void a purported will for failure to comply with the requirements as to form contained in a State statute?

2. Where a State statute authorizes the execution of a will, and the statute requires as a condition to the validity of a will executed thereunder that the testatrix sign the will in the presence of a Notary Public and two witnesses, and the fact of such signature before the Notary Public and two witnesses be evidenced in writing above the signatures of the Notary Public and witnesses and the testatrix at the end of the will, and a State Court declares null a purported will purporting to be executed under such statute for the reason that such facts are not evidenced above the signature of the testatrix, but the constitu-

tional validity of the State statute is not challenged, is there a substantial Federal question involved?

3. Where the judgment of the State Court appealed from is based upon a reasonable interpretation of a State statute authorizing the execution of a will and requiring as a condition to the validity of the will that the will be signed before a Notary Public and two witnesses and such facts of signature before the Notary Public and two witnesses be evidenced in writing above the signatures of the Notary Public and witnesses and the testator at the end of the will, and the judgment not involving any question under the Constitution or laws of the United States, does the judgment rest on an adequate non-federal basis?

ARGUMENT

1. NO FEDERAL QUESTION WAS RAISED OR PASSED ON IN ANY STATE COURT.

The Courts of Louisiana will inquire into the question of whether any State statute is unconstitutional as a violation of the Federal Constitution. *State v. Birdsell,* 235 La. 396, 104 So. 2d 148 (1958), Supreme Court of Louisiana. However, the courts of Louisiana follow the rule that he who urges the unconstitutionality of a law must specially plead its unconstitutionality and show specifically where it is unconstitutional; and that an argument of unconstitutionality which is not raised by the pleadings is

not properly before the State court and cannot be considered on appeal to the State appellate courts. *State v. Great Atlantic & Pacific Tea Co.*, 190 La. 925, 183 So. 219 (1938), Supreme Court of Louisiana, certiorari denied *Great Atlantic & Pacific Tea Co. v. State of Louisiana*, 305 U. S. 637, 59 S. Ct. 108, 83 L. Ed. 410 (1938).

The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a State court, it must appear that there were Federal questions involved which were raised in the State courts at the proper time. Supreme Court of the United States, Rules 15 1(d) and 16 1(b); *Edelman v. People of State of California*, 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387 (1953); *Hulbert v. Chicago*, 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026 (1906). The statute authorizing appeal to the Supreme Court of the United States, 28 U. S. Code 1257(2) requires as a basis for such appeal that there be drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision of the State court be in favor of its validity.

Appellants have not pleaded, argued, or raised in any manner the question of the validity of any State statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and there has been

no ruling of any State court pertaining to such a question. The Supreme Court of the United States has also ruled that certiorari is not available for review of a State court judgment where there has been no Federal question raised or presented to the State court for decision. *Newsom v. Smyth,* 365 U. S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803 (1961); *Ellis v. Dixson,* 349 U. S. 458, 75 S. Ct. 850, 99 L. Ed. 1231 (1955); *Congress of Industrial Organizations v. McAdory,* 325 U. S. 472, 65 S. Ct. 1395, 89 L. Ed. 1741 (1945). The statute providing for writ of certiorari is 28 U. S. Code 1257(3). This case is not within the scope of that statute.

2. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

In their jurisdictional statement, appellants complain of judgment of the State court against them for costs. Samuel Emanuel and Mary Stewart Emanuel were acting individually in their own interests and not in the interest of any Succession. The judgment of the State court correctly followed Article 1920 of the Louisiana Code of Civil Procedure (Appendix "E", infra).

In their jurisdictional statement, appellants complain of the ruling of the State court that they could not introduce evidence to attack the will of Joe Wilson collaterally in these proceedings. The ruling of the State court is supported by Article 2931 of the Louisiana Code of

Civil Procedure (Appendix "C", infra).

In their jurisdictional statement, appellants complain of the trial Court taking under advisement its decision on the trial of the opposition to the appointment of Samuel Emanuel as testamentary executor. Samuel Emanuel deliberately sought his appointment as testamentary executor in a contradictory motion, after notice to appellee, and a substantial question was raised by the opposition. The nullity of the purported will of Irma Turner Stewart (Wilson) appears upon the face of the purported will. No amount of evidence could write into the purported will the attestation clause required by the State statute (Louisiana Revised Statutes, Title 9, Sec. 2442, Appendix "A" infra), and a substantial question was presented to the trial Court as to whether such a purported will, null upon the face of the will, was a "testament" within the meaning of Article 2931 of the Louisiana Code of Civil Procedure protecting a probated "testament" from collateral attack. It was reasonable and the State court was acting within State law to take the matter under advisement upon briefs to be submitted by the parties in such a contradictory proceeding.

In their jurisdictional statement, appellants complain of the State court decreeing the purported will of Irma Turner Stewart (Wilson) to be a nullity, notwithstanding there was no fraud of any kind alleged by appellee in

attacking the will. The opinion of the Court of Appeal of Louisiana, Second Circuit (213 So. 2d 776), quoted by appellants as Appendix "B" in jurisdictional statement, is supported by the authorities cited in that opinion, particularly *Succession of Michie,* 183 So. 2d 436, Court of Appeal of Louisiana, Second Circuit (1966), certiorari or writ of review denied by the Supreme Court of Louisiana, 185 So. 2d 529.

The Supreme Court of the United States accepts and is bound by the construction given to State statutes by the State courts. *U. S. v. Burnison,* 339 U. S. 87, 70 S. Ct. 503, 94 L. Ed. 675 (1950); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947). Rights to succession by will are created by the State and may be limited, conditioned, or abolished by it. *Demorest v. City Bank Farmers' Trust Co.,* 321 U. S. 36, 64 S. Ct. 384, 88 L. Ed. 526 (1944); *Irving Trust Co. v. Day,* 314 U. S. 556, 62 S. Ct. 398, 86 L. Ed. 452, 137 A. L. R. 1093 (1942). In *Soileau v. Ortego,* 189 La. 713, 180 So. 496 (1938), the Supreme Court of Louisiana declared the law in Louisiana as being that the intention to make a will, although clearly stated or proved, will be ineffectual unless the execution thereof complies with the statutory requirements; and any material deviation from the manner of execution prescribed by the statute will be fatal to the validity of the will; and the fact that there is no fraud, or even suggestion

or intimation of it, will not justify the Courts in departing from the statutory requirements, even to bring about justice in the particular instance, since any material relaxation of the statutory rule will open up a fruitful field for fraud, substitution, and imposition. That the intention of a testator is not to be considered where the writing fails to comply with the requirements of the statute providing the form for a will, is a reasonable rule, is illustrated by the decision of the United States District Court for the District of Columbia in *In Re Lee's Estate,* 80 F. Supp. 293 (1948).

In their jurisdictional statement, appellants complain of the ruling of the State court permitting Joe Wilson to inherit from his deceased wife, Irma Turner Wilson, in the absence of proof that Irma Turner Wilson left no collateral relations. Appellants have admitted in their answer that Irma Turner Wilson left no descendants or ascendants (R. 46-48). The marriage license of Joe Wilson and Irma Turner Stewart is in the record (R. 20), and appellants do not contest the validity of the marriage. The ruling of the State court that after Joe Wilson had proved his heirship as the surviving husband there was no burden of proof upon him to prove that there were no collateral relations of decedent, but on the contrary, the burden was on the proponents of the will in contesting the right of the husband to assert its invalidity, to, at least, establish prima facie the existence of collateral relations of dece-

dent, is supported by the authorities cited by the Court of Appeal of Louisiana, Second Circuit, in its opinion.

Appellants argue as to whether the Succession of Irma Turner Wilson is a testamentary succession or an irregular succession. It is obvious that a succession is testamentary only when there is a valid will. The question in this case was whether the will of Irma Turner Wilson was valid. The will being a nullity, the Succession of Irma Turner Wilson is not and has not been a testamentary succession.

On pages 14, 15, 16 and 17 of their jurisdictional statement, appellants seek to raise some questions pertaining to proceedings in the Succession of Joe Wilson. Those matters are not supported by the record in this case, and have not been issues in this case, but have been issues in other litigation in which appellants have sought to attack the will of Joe Wilson. Those matters are not issues in this case.

Appellants complain on page 6 of their jurisdictional statement that exception of no cause of action filed by appellants was not passed on by the State courts. The hearing of the case on trial and rendering judgment for plaintiffs had the effect of overruling the exception. *Trahan v. Lantier,* 33 So. 2d 136 (1947), Court of Appeal of Louisiana, First Circuit.

3. THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

As shown above, the judgment of the State court rests entirely upon a reasonable interpretation of State statutes.

CONCLUSION

For the foregoing reasons, appellee moves that this appeal be dismissed, and that the alternate prayer of appellants that the papers submitted as a jurisdictional statement be treated as a petition for writ of certiorari be denied.

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PROOF OF SERVICE

I, Howell H. Heard, Attorney for appellee herein, a member of the Bar of the Supreme Court of the United States, hereby certify that on this the third day of April, 1969, I served a copy of the foregoing motion to dismiss on appellants, Samuel Emanuel and Mary Stewart Emanuel, by depositing the same in a United States post office, with first class postage prepaid, addressed to James Sharp, Jr., Attorney at Law, 105 North 23rd Street, Monroe, Louisiana, who is counsel of record for appellants.

HOWELL H. HEARD
Attorney for Appellee

APPENDIX "A"

Louisiana Revised Statutes, Title 9, Sec. 2442, as enacted by Act 66 of The Legislature of Louisiana of 1952, and as quoted by the Supreme Court of Louisiana in *Succession of Eck,* 233 La. 764, 98 So. 2d 181 (1957).

In addition to the methods provided in the Louisiana Civil Code, a will shall be valid if in writing (whether typewritten, printed, mimeographed, or written in any other manner), and signed by the testator in the presence of a Notary Public and two witnesses in the following manner:

(1) Testator. In the presence of the Notary and both witnesses the testator shall signify to them that the instrument is his will and shall sign each separate sheet of the instrument.

(2) Notary Public and Witnesses. The Notary and both witnesses must sign at the end of the will.

(a) In the presence of the testator, and

(b) In the presence of each other.

(3) The foregoing facts shall be evidenced in writing above the signatures of the Notary Public and witnesses and the testator at the end of the will. Such declaration may be in the following form or a form substantially similar thereto:

(a) Signed (on each page) and declared by testator above named, in our presence to be his last will and testament, and in the presence of the testator and each other we have hereunto subscribed our names on this ..... day of....., 19.....

APPENDIX "B"

Louisiana Code of Civil Procedure, Article 3081, Petition for Confirmation

After the probate of the testament, or after its production into court as provided by Article 2891 if it is a nuncupative testament by public act, the person named as executor therein may petition the court for confirmation, and the issuance of letters testamentary. If he files the original petition for the execution of the testament, he may pray therein for the issuance of letters.

APPENDIX "C"

Louisiana Code of Civil Procedure, Article 2931, Annulment of probated testament by direct action; defendants

A probated testament may be annulled only by a direct action brought in the succession proceeding against the legatees, the residuary heir, if any, and the executor, if he has not been discharged. The defendants shall be cited, and the action shall be tried as an ordinary proceeding.

APPENDIX "D"

Louisiana Code of Civil Procedure, Article 801, Voluntary substitution for deceased party; legal successor

When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality.

Legal successor, as used in Article 801 through 804, means the succession representative of the deceased appointed by a court of this state, if the succession is under administration; and otherwise means the heirs or legatees of the deceased.

APPENDIX "E"

Louisiana Code of Civil Procedure, Article 1920, Costs; parties liable; procedure for taxing

Unless the judgment provides otherwise, costs shall be paid by the party cast, and may be taxed by a rule to show cause.

Except as otherwise provided by law, the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable.